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IN THE

Supreme Court of the United States

Misc. No. 239

KOKI HIROTA, a citizen and national of Japan, appearing by his attorney and next friend, David F. Smith,

Petitioner,

vs.

1. General of the Army Douglas MacArthur, individually and as General of the Army of the United States in the Military Occupied Territory of Japan and as Supreme Commander for the Allied Powers. 2. Lieut. General Walton H. Walker, individually and as Commander of the 8th Army of the United States in the Military Occupied Territory of Japan. 3. James V. Forrestal, individually and as Secretary of National Defense of the United States, and 4. Kenneth C. Royall, individually and as Secretary, Department of the Army of the United States,

Defendants.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF HABEAS CORPUS, PETITION FOR WRIT OF HABEAS CORPUS AND MOTION FOR STAY OF EXECUTION

DAVID F. SMITH,
Attorney for Petitioner.

WILLIAM LOGAN, JR.,
JOHN G. BRANNON,
GEORGE YAMAOKA,
Of Counsel.

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Petitioner,

vs.

General of the Army Douglas MacArthur, individually and as General of the Army of the United States in the Military Occupied Territory of Japan and as Supreme Commander for the Allied Powers; *et al.*,

Defendants.

Motion for Leave to File Annexed Petition for a Writ of Habeas Corpus on Behalf of Koki Hirota

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

And now comes the Petitioner, KOKI HIROTA, by his attorney and next friend, DAVID F. SMITH, and moves this Honorable Court to enter an order allowing the annexed Petition for a Writ of Habeas Corpu. on behalf of KOKI HIROTA to be filed and prosecuted.

KOKI HIROTA, by
DAVID F. SMITH,
His Attorney and Next Friend.

DAVID F. SMITH,
Attorney for Petitioner.

Petition for Writ of Habeas Corpus

IN THE

SUPREME COURT OF THE UNITED STATES

Misc. No. 239

KOKI HIROTA, a citizen and national of Japan, appearing by his attorney and next friend, David F. Smith,

Petitioner,

vs.

1. General of the Army Douglas MacArthur, individually and as General of the Army of the United States in the Military Occupied Territory of Japan and as Supreme Commander for the Allied Powers. 2. Lieut. General Walton H. Walker, individually and as Commander of the 8th Army of the United States in the Military Occupied Territory of Japan. 3. James V. Forrestal, individually and as Secretary of National Defense of the United States, and 4. Kenneth C. Royall, individually and as Secretary, Department of the Army of the United States,

Defendants.

The Petition of KOKI HIROTA, a citizen and national of Japan, respectfully represents to the Honorable, the Supreme Court of the United States the following:

1. The Defendant, General of the Army Douglas MacArthur is a citizen of the United States, and is sued individually and as General of the Army of the United States in the Military Occupied Territory of Japan and in his capacity as Supreme Commander for the Allied Powers and also as the person who has the efficient custody and control of the Petitioner.

2. The Defendant, Lieut. General Walton H. Walker is a citizen of the United States, and is sued individually

and as Commander of the 8th Army of the United States in the Military Occupied Territory of Japan and as the person who has the immediate physical custody of the Petitioner.

3. The Defendant, James V. Forrestal, is a citizen of the United States and is sued herein individually and as Secretary of National Defense of the United States and as the person who has the power to command the Defendants, General of the Army Douglas MacArthur and Lieut. General Walton H. Walker.

4. The Defendant, Kenneth C. Royall is a citizen of the United States and is sued herein individually and as Secretary of the Department of the Army of the United States and also as the person who has the efficient power to control the official acts of General of the Army Douglas MacArthur and Lieut. General Walton H. Walker.

5. Petitioner was arrested and taken into custody upon an order issued by the Commanding General of the United States 8th Army of Japan, and confined to Sugamo Prison in Tokyo, Japan, in the latter part of 1945, and the Petitioner has been detained in said prison ever since.

6. Petitioner alleges that he has been unlawfully imprisoned and restrained of his liberty continuously since the latter part of 1945 by reason of illegal actions taken by the Defendants herein, all of which will more specifically appear hereafter.

7. The Petitioner has always been a career diplomat. He has never held any military office or position at any time. He served as Foreign Minister of the Japanese Empire from September, 1933, until March, 1936, when he became Prime Minister. From the fall of his cabi-

net in February, 1937, for four months he held no public office. He was Foreign Minister again in the first Konoye Cabinet until May 10, 1938, at which time he resigned his last public office and retired to private life. He had no connection with the Pacific war proper or anything which transpired in connection with the Japanese prosecution of that war. The petitioner, together with other former Prime Ministers of Japan, was called before the Emperor of Japan on November 29, 1941, to express his opinion as a senior statesman of Japan with respect to the position of the Tojo Government that the Pacific war was "inevitable" from the standpoint of the national defense of Japan and on that occasion he expressed a dissuading point of view with respect to the Japanese participation in the Pacific war proper.

8. On December 1, 1943, the United States of America, the Republic of China, and the United Kingdom, by the executive heads of their respective Governments, proclaimed as follows:

"THE CAIRO CONFERENCE

UNITED STATES OF AMERICA: PRESIDENT ROOSEVELT
CHINA: GENERALISSIMO CHIANG KAI-SHEK
UNITED KINGDOM: PRIME MINISTER CHURCHILL

Statement Released December 1, 1943

"The several military missions have agreed upon future military operations against Japan. The Three Great Allies expressed their resolve to bring unrelenting pressure against their brutal enemies by sea, land, and air. This pressure is already rising.

"The Three Great Allies are fighting this war to restrain and punish the aggression of Japan. They covet no gain for themselves and have no thought of territorial expansion. It is their purpose that Japan

shall be stripped of all the islands in the Pacific which she has seized or occupied since the beginning of the first World War in 1914, and that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores, shall be restored to the Republic of China. Japan will also be expelled from all other territories which she has taken by violence and greed. The aforesaid three great powers, mindful of the enslavement of the people of Korea, are determined that in due course Korea shall become free and independent.

"With these objects in view the three Allies, in harmony with those of the United Nations at war with Japan, will continue to persevere in the serious and prolonged operations necessary to procure the unconditional surrender of Japan."

9. On July 26, 1945, a proclamation was issued by the executive heads of the Governments of the United States, United Kingdom, and China, known as the Potsdam Declaration, which reads as follows:

"POTSDAM DECLARATION

PROCLAMATION BY HEADS OF GOVERNMENTS, UNITED STATES, UNITED KINGDOM, AND CHINA

"(1) We—the President of the United States, the President of the National Government of the Republic of China, and the Prime Minister of Great Britain, representing the hundreds of millions of our countrymen, have conferred and agree that Japan shall be given an opportunity to end this war.

"(2) The prodigious land, sea and air forces of the United States, the British Empire and of China, many times reinforced by their armies and air fleets from the west, are poised to strike the final blows upon Japan. This military power is sustained and inspired by the determination of all the Allied Nations to prosecute the war against Japan until she ceases to resist.

"(3) The result of the futile and senseless German resistence to the might of the aroused free peoples of the world stands forth in awful clarity as an example to the people of Japan. The might that now converges on Japan is immeasurably greater than that which, when applied to the resisting Nazis, necessarily laid waste to the lands, the industry and the method of life of the whole German people. The full application of our military power, backed by our resolve, *will* mean the inevitable and complete destruction of the Japanese armed forces and just as inevitably the utter devastation of the Japanese homeland.

"(4) The time has come for Japan to decide whether she will continue to be controlled by those self-willed militaristic advisers whose unintelligent calculations have brought the Empire of Japan to the threshold of annihilation, or whether she will follow the path of reason.

"(5) *Following are our terms.* We will not deviate from them. There are no alternatives. We shall brook no delay.

"(6) There must be eliminated for all time the authority and influence of those who have deceived and misled the people of Japan into embarking on world conquest, for we insist that a new order of peace, security and justice will be impossible until irresponsible militarism is driven from the world.

"(7) Until such a new order is established *and* until there is convincing proof that Japan's war-making power is destroyed, points in Japanese territory to be designated by the Allies shall be occupied to secure the achievement of the basic objectives we are here setting forth.

"(8) The terms of the Cairo Declaration shall be carried out and Japanese sovereignity shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine.

"(9) The Japanese military forces, after being completely disarmed, shall be permitted to return to

their homes with the opportunity to lead peaceful and productive lives.

"(10) We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including whose who have visited cruelties upon our prisoners. The Japanese Government shall remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people. Freedom of speech, of religion, and of thought, as well as respect for the fundamental human rights, shall be established.

"(11) Japan shall be permitted to maintain such industries as will sustain her economy and permit the exaction of just reparations in kind, but not those which would enable her to re-arm for war. To this end, access to, as distinguished from control of, raw materials shall be permitted. Eventual Japanese participation in world trade relations shall be permitted.

"(12) The occupying forces of the Allies shall be withdrawn from Japan as soon as these objectives have been accomplished and there has been established in accordance with the freely expressed will of the Japanese people a peacefully inclined and responsible government.

"(13) We call upon the government of Japan to proclaim now the unconditional surrender of all Japanese armed forces, and to provide proper and adequate assurances of their good faith in such action. The alternative for Japan is prompt and utter destruction."

10. On September 2, 1945, on board the *SS Missouri* an instrument of surrender on behalf of the Japanese Empire was signed, which reads as follows:

"INSTRUMENT OF SURRENDER

"We, acting by command of and in behalf of the Emperor of Japan, the Japanese Government and the Japanese Imperial General Headquarters, hereby ac-

cept the provisions set forth in the declaration issued by the heads of the Governments of the United States, China and Great Britain on 26 July 1945 at Potsdam, and subsequently adhered to by the Union of Soviet Socialist Republics, which four powers are hereafter referred to as the Allied Powers.

"We hereby proclaim the unconditional surrender to the Allied Powers of the Japanese Imperial General Headquarters and of all Japanese armed forces and all armed forces under Japanese control wherever situated.

"We hereby command all Japanese forces wherever situated and the Japanese people to cease hostilities forthwith, to preserve and save from damage all ships, aircraft, and military and civil property and to comply with all requirements which may be imposed by the Supreme Commander for the Allied Powers or by agencies of the Japanese Government at his direction.

"We hereby command the Japanese Imperial General Headquarters to issue at once orders to the Commanders of all Japanese forces and all forces under Japanese control wherever situated to surrender unconditionally themselves and all forces under their control.

"We hereby command all civil, military and naval officials to obey and enforce all proclamations, orders and directives deemed by the Supreme Commander for the Allied Powers to be proper to effectuate this surrender and issued by him or under his authority and we direct all such officials to remain at their posts and to continue to perform their non-combatant duties unless specifically relieved by him or under his authority.

"We hereby undertake for the Emperor, the Japanese Government and their successors to carry out the provisions of the Potsdam Declaration in good faith, and to issue whatever orders and take whatever action may be required by the Supreme Commander for the Allied Powers or by any other designated representa-

tive of the Allied Powers for the purpose of giving effect to that Declaration.

"We hereby command the Japanese Imperial Government and the Japanese Imperial General Headquarters at once to liberate all allied prisoners of war and civilian internees now under Japanese control and to provide for their protection, care, maintenance and immediate transportation to places as directed.

"The authority of the Emperor and the Japanese Government to rule the state shall be subject to the Supreme Commander for the Allied Powers who will take such steps as he deems proper to effectuate these terms of surrender.

"Signed at Tokyo Bay, Japan, at 0904 on the Second day of September, 1945.

"MAMORU SHIGEMITSU
By Command and in behalf of the Emperor of Japan and the Japanese Government.

YOSHIJIRO AMEZU
By Command and in behalf of the Japanese Imperial General Headquarters.

"Accepted at Tokyo Bay, Japan at 0908 on the Second day of September, 1945, for the United States, Republic of China, United Kingdom and the Union of Soviet Socialist Republics, and in the interests of the other United Nations at war with Japan.

DOUGLAS MACARTHUR
Supreme Commander for the Allied Powers

"C. W. NIMITZ
United States
Representative

T. A. BLAMEY
Commonwealth of
Australia
Representative

HSU YUNG-CHANG
Republic of China
Representative

L. MOORE COSGRAVE
Dominion of Canada
Representative

BRUCE FRASER
United Kingdom
Representative

LE CLERC
Provisional Government of
the French Republic
Representative

LIEUTENANT GENERAL
K. DEREVYANKO
Union of Soviet
Socialist Republics
Representative

C. E. L. HELFRICH
Kingdom of the Netherlands
Representative

LEONARD M. ISITT
Dominion of New Zealand Representative"

1. On September 2, 1945, the following proclamation was issued by the Emperor of Japan:

"PROCLAMATION BY THE EMPEROR OF JAPAN

"Accepting the terms set forth in the Declaration issued by the heads of the Governments of the United

States, Great Britain and China on July 26, 1945, at Potsdam and subsequently adhered to by the Union of Soviet Socialist Republics, I have commanded the Japanese Imperial Government and the Japanese Imperial General Headquarters to sign on my behalf the instrument of surrender presented by the Supreme Commander for the Allied Powers and to issue General Orders to the Military and Naval forces in accordance with the direction of the Supreme Commander for the Allied Powers. I command all my people forthwith to cease hostilities, to lay down their arms and faithfully to carry out all the provisions of the instrument of surrender and the General Orders issued by the Japanese Imperial General Headquarters thereunder."

12. On January 19, 1946, the Defendant General of the Army Douglas MacArthur, acting in his capacity as General of the Army of the United States and Supreme Commander for the Allied Powers, issued a special proclamation at Tokyo, Japan, for the establishment of an International Military Tribunal for the Far East, which reads as follows:

"SPECIAL PROCLAMATION

ESTABLISHMENT OF AN INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST

"WHEREAS, the United States and the Nations allied therewith in opposing the illegal wars of aggression of the Axis Nations, have from time to time made declarations of their intentions that war criminals should be brought to justice;

"WHEREAS, the Governments of the Allied Powers at war with Japan on the 26th July 1945 at Potsdam, declared as one of the terms of surrender that stern justice shall be meted out to all war criminals including those who have visited cruelties upon our prisoners;

"WHEREAS, by the Instrument of Surrender of Japan executed at Tokyo Bay, Japan, on the 2nd September 1945, the signatories for Japan, by command of and in behalf of the Emperor and the Japanese Government accepted the terms set forth in such Declaration at Potsdam;

"WHEREAS, by such Instrument of Surrender, the authority of the Emperor and the Japanese Government to rule the state of Japan is made subject to the Supreme Commander for the Allied Powers, who is authorized to take such steps as he deems proper to effectuate the terms of surrender;

"WHEREAS, the undersigned has been designated by the Allied Powers as Supreme Commander for the Allied Powers to carry into effect the general surrender of the Japanese armed forces;

"WHEREAS, the Governments of the United States, Great Britain and Russia at the Moscow Conference, 26th December 1945, having considered the effectuation by Japan of the Terms of Surrender, with the concurrence of China have agreed that the Supreme Commander shall issue all Orders for the implementation of the Terms of Surrender.

"NOW, THEREFORE, I, Douglas MacArthur, as Supreme Commander for the Allied Powers, by virtue of the authority so conferred upon me, in order to implement the Term of Surrender which requires the meting out of stern justice toward criminals, do order and provide as follows:

"ARTICLE 1. There shall be established an International Military Tribunal for the Far East for the trial of those persons charged individually, or as members of organizations, or in both capacities, with offenses which include crimes against peace.

"ARTICLE 2. The Constitution, jurisdiction and functions of this Tribunal are those set forth in the Charter of the International Military Tribunal for the Far East, approved by me this day.

"ARTICLE 3. Nothing in this Order shall prejudice the jurisdiction of any other international, national or occupation court, commission or other tribunal established or to be established in Japan or in any territory of a United Nation with which Japan has been at war, for the trial of war criminals.

"Given under my hand at Tokyo, this 19th day of January, 1946.

DOUGLAS MACARTHUR,
General of the Army, United States Army
Supreme Commander for the Allied Powers."

13. On April 26, 1946, General of the Army Douglas MacArthur issued General Orders No. 20, amending General Orders No. 1, which promulgated the Charter of the International Military Tribunal for the Far East as follows:

"GENERAL HEADQUARTERS
SUPREME COMMANDER FOR THE ALLIED POWERS

APO 500
26 April 1946

GENERAL ORDERS
No. 20

"General Orders No. 1, General Headquarters, Supreme Commander for the Allied Powers, 19 January 1946, subject as below, is superseded. The Charter of the International Military Tribunal for the Far East established by Proclamation of the Supreme Commander for the Allied Powers, 19 January 1946, is amended, and as amended, reads as follows:

CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST

SECTION I

CONSTITUTION OF TRIBUNAL

"ARTICLE 1. *Tribunal Established.* The International Military Tribunal for the Far East is hereby established for the just and prompt trial and punishment of the major war criminals in the Far East. The permanent seat of the Tribunal is in Tokyo.

"ARTICLE 2. *Members.* The Tribunal shall consist of not less than six members nor more than eleven members, appointed by the Supreme Commander for the Allied Powers from the names submitted by the Signatories to the Instrument of Surrender, India, and the Commonwealth of the Philippines.

"ARTICLE 3. *Officers and Secretariat.*

"a. *President.* The Supreme Commander for the Allied Powers shall appoint a Member to be President of the Tribunal.

"b. *Secretariat.*

"(1) The Secretariat of the Tribunal shall be composed of a general Secretary to be appointed by the Supreme Commander for the Allied Powers and such assistant secretaries, clerks, interpreters, and other personnel as may be necessary.

"(2) The General Secretary shall organize and direct the work of the Secretariat.

"(3) The Secretariat shall receive all documents addressed to the Tribunal, maintain the records of the Tribunal, provide necessary clerical services to the Tribunal and its members, and perform such other duties as may be designated by the Tribunal.

"ARTICLE 4. *Convening and Quorum, Voting and Absence.*

"a. *Convening and Quorum.* When as many as six members of the Tribunal are present, they may convene the Tribunal in formal session. The presence of a majority of all members shall be necessary to constitute a quorum.

"b. *Voting.* All decisions and judgments of this Tribunal, including convictions and sentences, shall be by a majority vote of those members of the Tribunal present. In case the votes are evenly divided, the vote of the President shall be decisive.

"c. *Absence.* If a member at any time is absent and afterwards is able to be present, he shall take part in all subsequent proceedings; unless he declares in open court that he is disqualified by reason of insufficient familiarity with the proceedings which took place in his absence.

"SECTION II

JURISDICTION AND GENERAL PROVISIONS

"ARTICLE 5. *Jurisdiction Over Persons and Offenses.* The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offenses which include Crimes against Peace. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

"a. *Crimes against Peace:* Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

"b. *Conventional War Crimes*: Namely, violations of the laws or customs of war;

"c. *Crimes against Humanity*: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed before or during the war, or prosecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.

"ARTICLE 6. *Responsibility of Accused.* Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior, shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

"ARTICLE 7. *Rules of Procedure.* The Tribunal may draft and amend rules of procedure consistent with the fundamental provisions of this Charter.

"ARTICLE 8. *Counsel.*

"a. *Chief of Counsel.* The Chief of Counsel designated by the Supreme Commander for the Allied Powers is responsible for the investigation and prosecution of charges against war criminals within the jurisdiction of this Tribunal and will render such legal assistance to the Supreme Commander as is appropriate.

"b. *Associate Counsel.* Any United Nation with which Japan has been at war may appoint an Associate Counsel to assist the Chief of Counsel.

"SECTION III

"FAIR TRIAL FOR ACCUSED

"ARTICLE 9. *Procedure for Fair Trial.* In order to insure fair trial for the accused the following procedure shall be followed:

"a. *Indictment.* The indictment shall consist of a plain, concise, and adequate statement of each offense charged. Each accused shall be furnished, in adequate time for defense, a copy of the indictment, including any amendment, and of this Charter, in a language understood by the accused.

"b. Language. The trial and related proceedings shall be conducted in English and in the language of the accused. Translations of documents and other papers shall be provided as needed and requested.

"c. *Counsel for Accused.* Each accused shall have the right to be represented by counsel of his own selection, subject to the disapproval of such counsel at any time by the Tribunal. The accused shall file with the General Secretary of the Tribunal the name of his counsel. If an accused is not represented by counsel and in open court requests the appointment of counsel, the Tribunal shall designate counsel for him. In the absence of such request the Tribunal may appoint counsel for an accused if in its judgment such appointment is necessary to provide for a fair trial.

"d. *Evidence for Defense.* An accused shall have the right, through himself or through his counsel (but not through both), to conduct his defense, including the right to examine any witness, subject to such reasonable restrictions as the Tribunal may determine.

"e. *Production of Evidence for the Defense.* An accused may apply in writing to the Tribunal for the production of witnesses or of documents. The application shall state where the witness or document is thought to be located. It shall also state the facts proposed to be proved by the witness or the document

and the relevancy of such facts to the defense. If the Tribunal grants the application the Tribunal shall be given such aid in obtainng production of the evidence as the circumstances require.

"ARTICLE 10. *Applications and Motions before Trial.* All motions, applications, or other requests addressed to the Tribunal prior to the commencement of trial shall be made in writing and filed with the General Secretary of the Tribunal for action by the Tribunal.

SECTION IV

POWERS OF TRIBUNAL AND CONDUCT OF TRIAL

"ARTICLE 11. *Powers.* The Tribunal shall have the power:

"a. To summon witnesses to the trial, to require them to attend and testify, and to question them.

"b. To interrogate each accused and to permit comment on his refusal to answer any question.

"c. To require the production of documents and other evidentiary material.

"d. To require of each witness an oath, affirmation, or such declaration as is customary in the country of the witness, and to administer oaths.

"e. To appoint officers for the carrying out of any task designated by the Tribunal, including the power to have evidence taken on commission.

"ARTICLE 12. *Conduct of Trial.* The Tribunal shall:

"a. Confine the trial strictly to an expeditious hearing of the issues raised by the charges.

"b. Take strict measures to prevent any action which would cause any unreasonable delay and rule out

irrelevant issues and statements of any kind whatsoever.

"c. Provide for the maintenance of order at the trial and deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any accused or his counsel from some or all further proceedings, but without prejudice to the determination of the charges.

"d. Determine the mental and physical capacity of any accused to proceed to trial.

"ARTICLE 13. *Evidence.*

"a. *Admissibility.* The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value. All purported admissions or statements of the accused are admissible.

"b. *Relevance.* The Tribunal may require to be informed of the nature of any evidence before it is offered in order to rule upon the relevance.

"c. *Specific evidence admissible.* In particular, and without limiting in any way the scope of the foregoing general rules, the following evidence may be admitted:

"(1) A document, regardless of its security classification and without proof of its issuance or signature, which appears to the Tribunal to have been signed or issued by any officer, department, agency or member of the armed forces of any government.

"(2) A report which appears to the Tribunal to have been signed or issued by the International Red Cross or a member thereof, or by a doctor of medicine or any medical service personnel, or by an investigator or intelligence officer, or by

any other person who appears to the Tribunal to have personal knowledge of the matters contained in the report.

"(3) An affidavit, deposition or other signed statement.

"(4) A diary, letter or other document, including sworn or unsworn statements, which appear to the Tribunal to contain information relating to the charge.

"(5) A copy of a document or other secondary evidence of its contents, if the original is not immediately available.

"d. *Judicial Notice.* The Tribunal shall neither require proof of facts of common knowledge, nor of the authenticity of official government documents and reports of any nation nor of the proceedings, records, and findings of military or other agencies of any of the United Nations.

"e. *Records, Exhibits, and Documents.* The transcript of the proceedings, and exhibits and documents submitted to the Tribunal, will be filed with the General Secretary of the Tribunal and will constitute part of the Record.

"ARTICLE 14. *Place of Trial.* The first trial will be held at Tokyo, and any subsequent trials will be held at such places as the Tribunal decides.

"ARTICLE 15. *Course of Trial Proceedings.* The proceedings at the Trial will take the following course:

"a. The indictment will be read in court unless the reading is waived by all accused.

"b. The Tribunal will ask each accused whether he pleads 'guilty' or 'not guilty.'

"c. The prosecution and each accused (by counsel only, if represented) may make a concise opening statement.

"d. The prosecution and defense may offer evidence, and the admissibility of the same shall be determined by the Tribunal.

"e. The prosecution and each accused (by counsel only, if represented) may examine each witness and each accused who gives testimony.

"f. Accused (by counsel only, if represented) may address the Tribunal.

"g. The prosecution may address the Tribunal.

"h. The Tribunal will deliver judgment and pronounce sentence.

"SECTION V

JUDGMENT AND SENTENCE

"ARTICLE 16. *Penalty.* The Tribunal shall have the power to impose upon an accused, on conviction, death, or such other punishment as shall be determined by it to be just.

"ARTICLE 17. *Judgment and Review.* The judgment will be announced in open court and will give the reasons on which it is based. The record of the trial will be transmitted directly to the Supreme Commander for the Allied Powers for his action. Sentence will be carried out in accordance with the Order of the Supreme Commander for the Allied Powers, who may at any time reduce or otherwise alter the sentence, except to increase its severity.

"By command of General MACARTHUR:

"RICHARD J. MARSHALL
Major General, General Staff Corps,
Chief of Staff

OFFICIAL:

/s/ B. M. Fitch
B. M. FITCH"

14. On February 15, 1946, General of the Army Douglas MacArthur, acting on behalf of 11 governments comprising the Allied Powers, including the Government of the United States of America, appointed nominees of each of the Allied Powers to act as judges on the International Military Tribunal for the Far East, and in a trial thereafter conducted by said Tribunal, as hereinafter set forth, General of the Army Douglas MacArthur substituted a second nominee of the United States after the trial had been in progress approximately three months.

15. The International Military Tribunal for the Far East conducted a trial under an indictment returned pursuant to the terms of the aforesaid charter, to which indictment the Petitioner pleaded not guilty. The Tribunal took evidence for a period of nearly two years, and on November 12, 1948, the Tribunal, by a majority finding and judgment, found the Petitioner guilty of participating "in the common plan of conspiracy to wage aggressive wars against China," and found the Petitioner guilty under Counts 1 and 27 of the indictment. The Tribunal also found the Petitioner guilty under Count 55 of the indictment in connection with an alleged dereliction of duty solely in connection with the so-called "Rape of Nanking" which occurred in December 1937 and January 1938, at which time the Petitioner was the Foreign Minister of Japan. The Petitioner received protests from foreign powers in connection with the alleged incident at Nanking and, as all the evidence before the Tribunal showed, promptly transmitted the protests to the Army, personally protested with respect to the alleged behavior of the Army, and otherwise fully discharged his duty as Foreign Minister. As there was no declaration of

war on the part of the Nationalist Regime Government of China or on the part of Japan until December 8, 1941, at which time the Nationalist Government of China declared war on Japan, this Petitioner was convicted under all three previously mentioned counts for acts and omissions which had no relation whatever to the Pacific war proper.

The Petitioner is informed that three of the eleven judges of the Tribunal representing India, the Netherlands, and France voted to acquit the Petitioner upon all three counts upon which he was convicted. Five of the eleven judges of the Tribunal representing India, the Netherlands, France, the Soviet Union and Australia expressed the view, as Petitioner is informed, that the death sentence imposed upon the Petitioner was too drastic and severe. The counts upon which the Petitioner was convicted read as follows:

"Count 1

"All the accused together with other persons, between the 1st January, 1928, and the 2nd September, 1945, participated as leaders, organizers, instigators, or accomplices in the formulation or execution of a common plan or conspiracy, and are responsible for all acts performed by any person in execution of such plan:

"The object of such plan or conspiracy was that Japan should secure the military, naval, political and economic domination of East Asia and of the Pacific and Indian Oceans, and of all countries bordering thereon and islands therein, and for that purpose they conspired that Japan should alone or in combination with other countries having similar objects, or who could be induced or coerced to join therein, wage declared or undeclared war or wars of aggression, and war or wars in violation of international law, treaties,

agreements and assurances, against any country or countries which might oppose that purpose.

"The whole of the Particulars in Appendix A, of the Treaty Articles in Appendix B, and of the Assurances in Appendix C, relate to this Count."

"Count 27

"All the accused, between the 18th September, 1931, and the 2nd September, 1945, waged a war of aggression and a war in violation of international law, treaties, agreements and assurances, against the Republic of China.

"The same Particulars, Treaty Articles and Assurances as in Count 2, relate to this Count."

"Count 55

"The accused DOHIHARA, HATA, HOSHINO, ITAGAKI, KAYA, KIDO, KIMURA, KOISO, MUTO, NAGANO, OKA, OSHIMA, SATO, SHIGEMITSU, SHIMADA, SUZUKI, TOGO, TOJO and UMEZU, between the 7th December, 1941, and the 2nd September, 1945, being by virtue of their respective offices responsible for securing the observance of the said Conventions and assurances and the Laws and Customs of War in respect of the armed forces in the countries hereinafter named and in respect of many thousands of prisoners of war and civilians then in the power of Japan belonging to the United States of America, the British Commonwealth of Nations, the Republic of France, the Kingdom of the Netherlands, the Commonwealth of the Philippines, the Republic of China, the Republic of Portugal and the Union of Soviet Socialist Republics, deliberately and recklessly disregarded their legal duty to take adequate steps to secure the observance and prevent breaches thereof, and thereby violated the laws of war.

"In the case of the Republic of China, the said offense began on the 18th September, 1931, and the

following accused were responsible for the same in addition to those named above: ARAKI, HASHIMOTO, HIRANUMA, HIROTA, MATSUI, MATSUOKA, MINAMI."

16. Pursuant to the finding and judgment of guilt by the International Military Tribunal of the Far East under the aforesaid counts indictment, the Tribunal sentenced the Petitioner to be hanged. Thereafter, within the period of one week allowed for an appeal by General of the Army Douglas MacArthur, Petitioner did appeal citing various errors committed by the Tribunal during the course and proceedings of the trial.

17. On or about November 23, 1948 the Defendant, General of the Army Douglas MacArthur denied the appeal of the Petitioner and issued an order commanding the Defendant, Lieut. General Walton H. Walker as Commander of the 8th Army of the United States in the Military Occupied Territory of Japan, to carry out at an undisclosed time the death sentence as "pronounced by the Tribunal" as the same was approved and affirmed by General of the Army Douglas MacArthur and Supreme Commander for the Allied Powers. Petitioner alleges that he will be executed instanter unless afforded immediate relief by this Honorable Court.

18. The Petitioner alleges that this Honorable Court has jurisdiction to issue the writ of Habeas Corpus requested herein and grant the relief sought under §§ 451 to 462, inclusive, of Title 28 of the United States Code; under the constitution, treaties, international engagements and laws of the United States of America. The Petitioner is presently in custody under and by color

of the authority of the United States, is in custody in violation of the constitution, treaties, international engagements and laws of the United States, is in custody for acts done or omitted under a right, title, authority, privilege, protection, and the exemption which he claims under the commission, order, or sanction of the Japanese Government by reason of having done the alleged acts for which he was convicted while serving as quasi-head of the Japanese Government in the capacity of Prime Minister and Foreign Minister, the validity and effect whereof depend upon the law of nations.

19. Petitioner alleges that General of the Army Douglas MacArthur, as a citizen of the United States, acting either in his capacity as a General of the Army of the United States or as Supreme Commander for the Allied Powers, had no authority at any time from the Congress or the President of the United States to create the International Military Tribunal for the Far East or to issue a special charter for the government and procedure of said Tribunal; and his action in that respect has never been ratified; that nothing contained in the Potsdam Declaration or the Japanese instrument of surrender of September 2, 1945, or anything done by way of "implementation" of the Japanese instrument of surrender, furnished any lawful basis for the creation of an International Military Tribunal for the trial of "crimes against peace," "crimes against humanity," and "conspiracy to commit crimes against peace and against humanity"; or for the trial of "conventional war crimes in violation of the customs and usage of war," in any court other than a national court or commission.

General of the Army Douglas MacArthur has not heretofore been authorized by any law enacted by the Congress of the United States of America or any provision of its Constitution to establish a Military Tribunal for the trial of war criminals other than an American Military Tribunal or commission; nor has the Congress of the United States of America authorized him to appoint American or Philippine civilian or military judges to an International Military Court or to associate or pool or commingle American interests and powers in such a Tribunal; nor has the Congress of the United States ever authorized or empowered him to accept an appointment or office or place of trust from sovereign foreign nations for the purpose of establishing an International Military Tribunal or to appoint either civilian or military judges of those foreign nations to such Tribunal; that the powers resting in General of the Army Douglas MacArthur, as Supreme Commander for the Allied Powers, are confined to the Military Occupation of Japan, the coordination of such operations, maintenance of the security of the occupation, including the power to appoint only an American Military Tribunal or commission for the trial of conventional war crimes, as the same have been heretofore defined in the customs and usages of war and in the Articles of War enacted by the Congress of the United States.

The action of General of the Army Douglas MacArthur, in accepting an office, title and place of trust from ten (10) foreign governments without consent of the Congress of the United States of America for this purpose, and undertaking to appoint civil and military judges to sit in an International Military Tribunal to represent such foreign governments and the United States,

and his reservation of sole right to review, approve, reverse or modify the final decision of such Tribunal on behalf of eleven governments, which decision of the Tribunal was purely advisory, was and is in violation of Article 1, Section 9, Clause 8 of the Constitution of the United States of America which reads in part: "And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept any present, Emolument, Office or Title, of any kind whatever, from any King, Prince or foreign State," and of Article 1, Section 8, Clause 14 of the Constitution of the United States of America which provides that the Congress has the sole power "to make Rules for the Government and Regulation of the land and naval forces." The amended charter of April 26, 1946 is repugnant to and in violation of Article 1, Section 9, Clause 3, of the Constitution of the United States of America which provides that "No Bill of Attainder or ex post facto law shall be passed"; that the body of law specially stated in the charter for the International Military Tribunal for the Far East defined a novel and non-existent body of the law of nations as it relates to "crimes against peace," "crimes against humanity," and conspiracy to commit such alleged crimes and, being ex post facto, were, by the same token, rendered acts of attainder against the Petitioner; and in that the provision for the trial of "conventional war crimes" at the international level, rather than in national courts as practiced since time immemorial, changed the rules, standards and forum after the commission of acts and omission for which the Petitioner was convicted and constituted ex post facto action; that the issuance of such special charter was repugnant to and in violation of Article 1, Section 8, Clause 10 of the Constitution of the United

States of America which provides that the Congress shall have sole power "to define and punish * * * offenses against the laws of nations," in that the Congress of the United States has never at any time defined any such body of law; nor has the "law" stated in the charter been otherwise recognized by the legislative, executive or judicial authority of the United States of America to be either national law or the law of nations; that the statement of such alleged body of law set forth in the special charter is repugnant to and in violation of the Fifth Amendment to the Constitution of the United States of America which provides in part, "No person * * * shall * * * be deprived of life, liberty, or property, without due process of law; * * *," in that the statement of such a novel body of law, having no previous existence or recognition at either the national or international level by the United States or in other civilized nations, deprived this Petitioner in circumstances of this case of life and liberty without due process of law under authority and color of an act performed by a citizen and a military officer of the United States; that the action of General of the Army Douglas MacArthur, in stating such novel body of law in the special charter, constituted the exercise of legislative power not derived from the Constitution or laws of the United States of America or the laws of any foreign country represented on such Tribunal; and further neither the Potsdam Declaration nor the Japanese instrument of surrender created or established any new law, nor did said instruments authorize the creation or the establishment of any new law, national or international, for the trial of war criminals or the procedure to which Petitioner was subjected.

General of the Army Douglas MacArthur, in making and promulgating the amended charter of April 26, 1946 for the establishment, government and procedure of the Tribunal, so limited and circumscribed the functions and powers of the Tribunal and so altered, revised and abrogated the basic, essential and fundamental rules of evidence, procedure and trial as heretofore applied by National Military Tribunals and commissions and courts of criminal justice in all civilized nations, including the United States of America, that said amended charter itself deprived the Tribunal of all opportunity and power to accord this Petitioner a fair and impartial trial in accordance with basic, accepted and minimal standards of justice of all civilized nations; and this action is repugnant to and in violation of the 5th and 6th Amendments of the Constitution of the United States of America which provide in part, "No person * * * shall be deprived of life, liberty, or property, without due process of law; * * *," and "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." Said Tribunal in pursuance of the unprecedented procedure set forth in the charter received in evidence against this Petitioner, over objection and the exception of this Petitioner, hundreds of documents consisting of ex parte affidavits, unsigned and unsworn statements, diary entries, newspaper reports, unofficial documents, hearsay statements of the second and third degree, secondary evidence of the contents of the documents, unidentified reports, long prosecution summaries of its version of the contents of innumerable affidavits, reports, etc. which were not them-

selves introduced in evidence and which summary was accepted by the Tribunal as an exhibit in the trial; and the Tribunal thus deprived the Petitioner of the ordinary right of cross-examination and elementary justice; in pursuance of said special charter the Tribunal refused to call as witnesses at the request of the Petitioner the persons whose ex parte affidavits were admitted into evidence over his objection and exception; and the Tribunal on innumerable occasions refused to call witnesses at the request of the Petitioner who were reasonably expected to give testimony relevant and material to the defense of this Petitioner; and in pursuance of the special and relaxed provisions of said charter the Tribunal required the Defendants to submit a higher standard of proof than was required of the Prosecution throughout the 8 months it took for presentation of its case; and otherwise the proceedings and rulings of said Tribunal on hundreds of occasions, mostly by majority vote, throughout the trial were contrary to the practice and procedure of national military courts and criminal courts, and by reason thereof the findings and judgment of said Tribunal were vitiated.

The basic actions of said Tribunal prejudicial to this Petitioner were further emphasized and facilitated by provisions of the special charter as follows:

Article 4(c) which provided that a judge of the Tribunal may function in absentia and as several of the judges absented themselves for considerable periods of time during the course of the trial, this Petitioner was deprived of the right to have such judges see and hear the witnesses for and against him and an opportunity to appraise their credibility; Article 5(a)

to (c), all inclusive, purported to define without authority of law, ex post facto, what constitutes alleged war crimes and violation of the laws and customs of war, thus depriving the Tribunal of all opportunity to judge and ascertain in its own right the status, meaning and condition of the laws of war as applied by the various nations of the world and by the nations represented on the Tribunal; Article 6 which permitted the Tribunal, as it did in fact, to strip this Petitioner of the right to defend on the ground that he acted or omitted to act by virtue of an order of the Japanese Government or of a superior; Article 13(a) which provided without authority of law that the technical rules of evidence (as heretofore applied by military tribunals, commissions and criminal courts) shall not be binding on the Tribunal and that the Tribunal may apply an unknown standard and rule of evidence of its own making, limited only by the views of the majority of the Tribunal as to what constituted "probative value"; Article 13(c)(1) to (5), all inclusive, which provided generally for the admission of evidence against this Petitioner by the Tribunal on innumerable occasions of hearsay and ex parte statements, reports, affidavits and depositions, thereby depriving the Petitioner of the ordinary right established since time immemorial to be confronted in military and criminal trials by the witnesses against him and to be afforded an opportunity to cross-examine any witness against him; and Article 13(a) which provides that the Tribunal may take judicial notice of various described matters, which it did on innumerable occasions, dealing wth subjects never heretofore considered by any military or judicial Tribunal as falling within the doctrine of judicial notice. The trial conducted by such Tribunal, pursuant to the

special charter, was prejudicial to your Petitioner in that the Tribunal in applying the charter rule of "probative value" summarily rejected by majority vote hundreds upon hundreds of material and relevant documents indispensable to the defense of this Petitioner upon the charges contained in the indictment and upon which he was convicted.

20. Petitioner alleges that nothing contained in the Potsdam Declaration or the Japanese instrument of surrender authorized the trial of this Petitioner or any other so-called war criminals for acts or omissions committed prior to the beginning of the Pacific war proper on December 7, 1941; and that the Japanese Government in accepting the terms embodied in the instrument of surrender understood and intended at that time that the provision relating to the punishment of "war criminals" applied only to acts of omissions occurring in connection with the Pacific war proper after December 7, 1941.

21. The International Military Tribunal for the Far East at the inception of the trial recommended to the Supreme Commander for the Allied Powers that Japanese Defense Counsel required the assistance and guidance of American Defense Counsel in order to properly prepare and present the defense, and such counsel were provided. The sole American Defense Counsel appearing for this Petitioner was suspended from further participation in the trial at the inception of the defense case and for six months thereafter during the taking of evidence of the defense case this Petitioner was deprived of American counsel to protect his individual interest in open court.

22. The Petitioner was convicted on Counts 1, 27 and 55, and under the findings of the Tribunal the conviction rested on acts and omissions which occurred prior to December 7, 1941, in its entirety. As the sentence of death imposed upon Petitioner was a single sentence applying to acts and omissions occurring prior to the Pacific war proper on December 7, 1941, the conviction of the Petitioner in its entirety is beyond the scope and purview of the Japanese instrument of surrender and the Potsdam Declaration and is, therefore, null and void in its entirety.

23. All of the points raised in this Petition were urged before the International Military Tribunal for the Far East and were rejected by it.

WHEREFORE, the premises considered, Petitioner respectfully prays:

1. That this Honorable Court issue forthwith the Writ of Habeas Corpus directed to the Defendants herein, but Petitioner waives the production of his person before this Court.

2. In the alternative, that the Tribunal stay the execution of the death sentence imposed upon the Petitioner until such time as this Honorable Court is able to consider this Petition upon its merits.

3. That upon final hearing the Petitioner be discharged from the custody of the Defendants and be restored to his liberty.

4. And for such other, further and general relief as to this Honorable Court may seem just and proper.

All of which is most respectfully submitted:

KOKI HIROTA

By DAVID F. SMITH,
his attorney and next friend

DAVID F. SMITH,
Attorney for Petitioner
Roger Smith Hotel
18th and Pa. Ave. N.W.
Washington, D. C.

WILLIAM LOGAN, JR., of Counsel
120 Broadway
New York City, New York

GEORGE YAMAOKA, of Counsel
120 Broadway
New York City, New York

District of Columbia, ss.:

DAVID F. SMITH, being first duly sworn according to law upon oath deposes and says that he was a duly appointed American Defense Counsel in the major trial of alleged war criminals before the International Military Tribunal for the Far East; that the Petitioner, Koki Hirota, is now confined in Sugamo Prison, in Tokyo, Japan; by reason of the peculiar circumstances of the case and because of considerations of distance and time and the

fact that the Petitioner is under sentence of death by hanging instanter, there has not been, and will not be, sufficient time to forward this Petition to the Petitioner for his signature and oath; that because of the foregoing this Petition has been executed by affiant instead of Petitioner; that affiant has read the foregoing Petition and upon information and belief verily believes the same to be true. Affiant further states that this Petition is filed in good faith without any purpose of delay.

DAVID F. SMITH,
Attorney and next friend for Petitioner,
Koki Hirota.

Subscribed and sworn to before me this 29th day of November, 1948.

CATHERINE C. BENSON,
Notary Public.

(Seal)

Service of a copy of the foregoing Petition for Writ of Habeas Corpus, Motion for Leave to file same, Motion for Stay of Execution, and Affidavit In Forma Pauperis acknowledged this 29th day of November, 1948.

PHILIP B. PERLMAN,
Solicitor General,
United States.

Motion for Stay of Execution

IN THE

SUPREME COURT OF THE UNITED STATES

Misc. No. 239

KOKI HIROTA, a citizen and national of Japan, appearing by his attorney and next friend, David F. Smith,

Petitioner,

vs.

General of the Army Douglas MacArthur, individually and as General of the Army of the United States in the Military Occupied Territory of Japan and as Supreme Commander for the Allied Powers; *et al.*,

Defendants.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Now comes the Petitioner, KOKI HIROTA, by his attorney and next friend, David F. Smith, and moves this Honorable Court for an immediate order, based upon the annexed Petition for a Writ of Habeas Corpus, directed to the Defendants, and each of them, ordering a stay of execution of the death sentence imposed upon the Petitioner until the further order of this Court.

KOKI HIROTA,
By DAVID F. SMITH,
Attorney and next friend of Petitioner,
Koki Hirota.

DAVID F. SMITH,
Attorney of Record for Petitioner,
Roger Smith Hotel,
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Washington, D. C.